

August 18, 1999

TO: Energy and Telecommunications Service Lists

FR: Burl W. Haar, Responsible Authority Designee, Minnesota Public Utilities Commission  
Jim Bernstein, Responsible Authority Designee, Minnesota Department of Public Service

**RE: Revised Procedures for Handling Trade Secret and Privileged Data**

On December 24, 1984, the Responsible Authority Designees of the Minnesota Public Utilities Commission (“Commission”) and the Minnesota Department of Public Service (“Department”) gave notice of their jointly adopted Internal Procedures for Handling Trade Secret Information. Developed pursuant to the Minnesota Government Data Practices Act, these procedures governed the internal handling of “proprietary” and “trade secret” commercial and financial data filed with the Commission. The Department joined the Commission in adopting the procedures because it maintains the data filed in all Commission matters. Within a year, these procedures were revised, and on October 25, 1985, the Designees gave notice of the Amended Internal Procedures for Handling Trade Secret Information.

In July 1994, the Commission adopted Minnesota Rule 7829.0500 which specified procedures to be followed when filing “privileged proprietary” or “trade secret” data with the Commission. In October 1998, a dispute arose about the public accessibility of certain contracts that had been filed with the Commission as proprietary, trade secret data. The matter was referred for resolution to the Public Information Policy Analysis division of the Minnesota Department of Administration. On December 31, 1998, the Commissioner of Administration issued an opinion advising that any “proprietary” data filed with the Commission and held by the Department is public data under the Data Practices Act and disclosable to anyone who requests it. Data that meets the Act’s definition of “trade secret,” however, is “nonpublic” data which is protected from disclosure. *See* Comm’r of Admin. Advisory Op. 98-054, at 2-3 (Dec. 31, 1998). The Commissioner also advised that insofar as Minnesota Rule 7829.0500 states that “proprietary,” non-trade secret data may be protected from disclosure by the Commission and Department, the rule must yield to the Data Practices Act, which is controlling law. *Id.* at 3-4.

Upon review of the Commissioner’s advisory opinion and the relevant law, we, as the Responsible Authority Designees of the Commission and Department, have concluded that commercial, financial, and other filed data that is merely “proprietary” in nature is indeed public data under the Data Practices Act and accessible to anyone upon request. *See* Minn. Stat. § 13.03, subd. 1. Data that meets the definition of trade secret data under the Act, however, is nonpublic and generally protected from public access. *See* Minn. Stat. § 13.37, subds. 1. (b) and 2. We also conclude that under Minnesota Rule 7829.0500, any “privileged” data filed with the Commission, whether proprietary or not, may also be protected from disclosure. *See* Minn. R. 7829.0500, subpt. 1 (protecting from disclosure “*privileged* proprietary information, trade secrets, or *other*

*privileged* information” (emphasis added). “Privileged” data, which is not subject to discovery, is exempt from the Data Practices Act. *See Kobluk v. University of Minnesota*, 574 N.W.2d 436, 440 & n.5 (Minn. 1998) (data to which the attorney-client privilege attaches is exempt from disclosure under the Data Practices Act). *See also* Minn. Stat. § 13.03, subd. 6 (in action under Data Practices Act to compel disclosure of not public data, action may proceed upon determination that the data sought is discoverable or releasable pursuant to the relevant rules of evidence and procedure).

In light of this, we have jointly adopted the enclosed Revised Procedures for Handling Trade Secret and Privileged Data, effective September 1, 1999. These procedures govern the form of trade secret and privileged data filed with the Commission and maintained by the Department, access to the data once it is held by these state agencies, and the use of such data in Commission and ALJ proceedings. Under the revised procedures, data identified as “proprietary” will be treated just as any other public data filed with the Commission. Only trade secret and privileged data will be protected from public disclosure.

Any questions regarding the procedures’ application should be directed to Commission Counsel in the Minnesota Attorney General’s Office.

Sincerely,

Burl W. Haar  
Executive Secretary  
Minnesota Public Utilities Commission

Jim Bernstein  
Deputy Commissioner  
Minnesota Department of Public Service

Enclosure

c: Edward Garvey, Chair - Minnesota Public Utilities Commission  
Gregory Scott, Commissioner - Minnesota Public Utilities Commission  
LeRoy Koppendrayner, Commissioner - Minnesota Public Utilities Commission  
Marshall Johnson, Commissioner - Minnesota Public Utilities Commission  
Joel Jacobs, Commissioner - Minnesota Public Utilities Commission  
Steve Minn, Commissioner - Minnesota Department of Public Service  
Thomas Bailey, Assistant Attorney General - State of Minnesota Office of Attorney General

**REVISED PROCEDURES FOR HANDLING TRADE SECRET  
AND PRIVILEGED DATA**

September 1, 1999

The Responsible Authority Designees of the Minnesota Public Utilities Commission ("Commission") and the Minnesota Department of Public Service ("Department") (collectively "the state agencies") have adopted the following procedures for handling of trade secret and privileged data filed with the Commission.

1.     **Definitions.** "Trade secret data" means data filed with the Commission that meets the definition of trade secret in the Minnesota Government Data Practices Act, Minnesota Statutes section 13.37 (1998). "Privileged data" means data filed with the Commission that is protected from disclosure pursuant to the rules of privilege recognized by law. "Protected data" means trade secret or privileged data as defined above.

2.     **Procedure for Filing Trade Secret and Privileged Data.** Consistent with Minnesota Rule 7829.0500, subpt. 2 (1997), trade secret or privileged data filed with the Commission shall be excised from all copies except for the original and six copies. A document containing trade secret or privileged data does not itself become trade secret or privileged; only the data within the document that meets the definition of trade secret or privileged data is protected data that may be excised. In the event that all or a substantial portion of the data in a document is excised, a statement must be filed describing the nature of the excised material, its authors, its import, and the date on which it was prepared. *See* Minn. R. 7829.0500, subpt. 3 (1997).

3.     **Identification of Trade Secret and Privileged Data.** Minnesota Rule 7829.0500, subpt. 4 (1997) requires that filed documents containing protected data must be clearly marked as containing data that is not for public disclosure. This requirement is met where the first page or cover page of the document is clearly captioned in bold print: **NONPUBLIC DOCUMENT- CONTAINS TRADE SECRET [or PRIVILEGED] DATA**. The rule also requires that every page on which protected data appears be similarly captioned, and that the protected data on the page be somehow clearly identified. The requirement of clearly identifying the protected data itself is met where the

protected data is placed within brackets and the beginning and end of the data is indicated. For example, trade secret data should be placed within brackets as shown: **[TRADE SECRET DATA BEGINS ... TRADE SECRET DATA ENDS]**. Privileged data should be identified in the same manner.

The first page or cover page of copies of a document from which protected data has been excised must be clearly captioned in bold print: **PUBLIC DOCUMENT- TRADE SECRET [or PRIVILEGED] DATA HAS BEEN EXCISED**. The beginning and end of the excised protected data must be identified within brackets in the same manner as when the protected data has not been excised.

4. **Statement Justifying Identification of Data as Trade Secret or Privileged.** In all cases where a person or entity files data with the Commission that is identified as trade secret or privileged, an accompanying statement justifying the state agencies treating the data as protected data must also be filed. This justification must include an explanation of how the data either meets the definition of a trade secret under Minnesota Statutes section 13.37, or is privileged under a rule of privilege recognized by law.

5. **Access to Trade Secret or Privileged Data.** Trade secret and privileged data is nonpublic and shall be protected from disclosure to the public. Internal access to protected data is limited to employees of the state agencies whose work assignments reasonably require access, and to other agencies, entities, and the data subject as authorized by state statute and federal law. *See* Minn. R. 1205.0400, subpt. 2 (1997). The state agencies exercise care in copying and storing protected data to prevent improper data disclosure both within and outside of the agencies.

Consultants hired to aid the state agencies in the execution of their duties may also have access to the data, and pursuant to statutory mandate will be contractually bound to handle the data in accordance with the requirements of the Data Practices Act as if the consultant were a government entity. *See* Act of May 25, 1999, ch. 250, art. 1, § 42, 1999 Minn. Laws (to be codified at Minn. Stat. § 13.05, subd. 11). The state agencies will not be held responsible for the actions of such a consultant

if the consultant has contractually agreed to manage the data as required by the Act and these procedures.

Access to protected data will also be given to those who have obtained the written consent of the person or entity who filed the protected data with the state agencies. *See* Minn. Stat. § 13.05, subd. 4(d) (1998).

6. **Trade Secret and Privileged Data in Contested Cases or Rulemakings.** In the event that trade secret or privileged data filed with the state agencies becomes relevant to a contested case or rulemaking hearing before the Office of Administrative Hearings, the protected data shall not be disclosed or introduced into evidence without prior notice to the presiding Administrative Law Judge for determination of the proper handling of the data. *See* Minn. Stat. § 14.60, subs. I and 2 (1998), and Minn. R. 1205.0100, subpt. 5 (1997).

7. **Trade Secret and Privileged Data in Commission Meetings.** All meetings where the Commission transacts public business must be open to the public. *See* Minn. Stat. § 471.705, subd. I (a) (1998). Except as expressly authorized by law, meetings may not be closed to discuss "not public" data., *Id.* subd. 1d(a) and (e). Minnesota Statutes section 237.115 (1998) expressly authorizes the Commission to close a meeting to discuss data that is subject to a protective order. Where such an order exists, the Commission will close a meeting consistent with the requirements of the order. Where trade secret or privileged data is not subject to a protective order, the data will be discussed in the open meeting.

The Commission also has authority to issue protective orders. *See* Minn. Stat. §§ 14.60, subs. I and 2 (1998); 216A.02, subd. 4 (1998); and 216A.05, subd. 1 (1998). Motions for a protective order should be made only in those cases where protected data is reasonably likely to be discussed in a Commission meeting. Therefore no such motions should be made until the comment period is closed for the matter in which the data was filed. In the event a protection order is sought, the motion should be filed no later than ten days after the due date for final reply comments. The Commission will determine whether to issue a protective order that closes the meeting after weighing

the data privacy interests, at stake against the Commission's duty to conduct public business in an open meeting.

8. **Requests for Public Access to Trade Secret or Privileged Data.** Upon receiving a request for public access to protected data filed with the Commission, the Responsible Authority Designee for the Commission will review the statement of justification originally filed with the data to determine whether the data is indeed protected. If it is determined that the data is protected, the data requester will be informed in writing that the data is not being disclosed and the reasons for nondisclosure. If it is determined that any or all of the data is not protected, the person or entity who filed the data will be informed in writing which data will be disclosed and the reasons for disclosure. Access to the data at issue will not be provided, however, until ten business days after the date of written notice of disclosure. The Commission's Responsible Authority Designee will inform both the data requester and the person or entity who filed the data of their right to challenge the Responsible Authority Designee's decision in district court pursuant to Minn. Stat. § 13.08, subd. 4 (1998).

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